INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Conclusion	11

CITATIONS

Cases:

American Construction Co. v. *Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372 11

Beard v. *Stahr*, 370 U.S. 41 ..... 5, 10, 11

Cafeteria & Restaurant Workers Union v. *McElroy*, 367 U.S. 886 11

Creary v. *Weeks*, 259 U.S. 336 11

Harmon v. *Brucker*, 355 U.S. 579 4

Ogden v. *Zuckert*, 298 F. 2d 312 5

Reaves v. *Ainsworth*, 219 U.S. 296 11

Reed v. *Franke*, 297 F. 2d 17 5

Vitarelli v. *Seaton*, 359 U.S. 535 11

White v. *Berry*, 171 U.S. 366 5

Statutes:

10 U.S.C. 3791–3797 ..... 3, 4, 11

28 U.S.C. 1292(a)(1) 11

28 U.S.C. 1292(b) 2, 5, 6, 7, 8

Miscellaneous:

AR 635–5, ¶ 5 4

H. Rep. 1667, 85th Cong., 2d Sess 7, 8, 9

S. Rep. 2434, 85th Cong., 2d Sess 6, 7, 8, 9, 10

Stern and Gressman, *Supreme Court Practice* (2d Ed., 1954), p. 130 11

714 189—62——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 594

JEWEL RICHARD BROWDER, PETITIONER

v.

CYRUS R. VANCE, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Court of Appeals for the District of Columbia Circuit rendered no opinion in this case, and its order denying permission to take an interlocutory appeal (Pet. App. 1a) is not yet reported. The memorandum and order of the district court (Pet. App. 2a–5a) are not yet reported.

JURISDICTION

The court of appeals has entered no judgment. Its order denying permission to take an interlocutory appeal was entered on September 20, 1963. The petition for a writ of certiorari was filed on October 30,

1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the denial by the court of appeals of petitioner's application for an interlocutory appeal constituted an abuse of its discretion in the circumstances of this case.

STATUTE INVOLVED

Section 1292(b) of Title 28 provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: * * *.

STATEMENT

1. The complaint in this case alleges the following facts, which are undisputed for purposes of consideration of the petition for certiorari.[1]

Petitioner is a commissioned officer in the United States Army, with a permanent rank of Major and a temporary rank of Lieutenant Colonel. He is on active duty in the Ordnance Corps and stationed at

[1] The record before the district court (and court of appeals) consisted only of petitioner's unverified complaint, his motion to convene a three-judge court, which is unsupported by any affidavit, and respondents' motion to dismiss.

Aberdeen Proving Ground, Maryland. In July, 1962, after petitioner had been acquitted by a general court martial of charges of having stolen various sums of money (Pet. App. 11a–15a, 17a), and having knowingly presented false travel claims and vouchers for payment (Pet. App. 16a–18a), petitioner was advised that a selection board of general officers convened at Headquarters, Department of the Army, had determined, pursuant to 10 U.S.C. 3791, that he should be required to show cause for retention on the active list of the Regular Army. The grounds asserted for the order to show cause were acts of personal misconduct, intentional misrepresentation of facts in official statements and records, and conduct unbecoming an officer (Pet. App. 19a–21a). Petitioner was entitled to elect among the following courses of action: (1) submitting his resignation, (2) requesting a discharge, (3) applying for voluntary retirement, and (4) appearing before a board of inquiry (Pet. App. 20a). Petitioner challenged the legality of the show cause order, but elected to appear before a board of inquiry.

Petitioner submitted a list of 30 witnesses whom he wished to have appear before the board. On November 2, 1962, he was advised that the government would not call 22 of the witnesses, but would provide transportation for the remaining eight (Pet. 4).[2] After a two day hearing, the board of inquiry

[2] In his petition in this Court petitioner contends that the 30 witnesses whom he wished to have present had submitted unsworn statements upon which "the Government's case was largely grounded" (Pet. 4). There was no comparable allegation in the complaint, which was before the courts below.

found that petitioner had shown cause for retention in regard to the allegations of personal misconduct and conduct unbecoming an officer, but that he had failed to show cause for retention in regard to the allegations of intentional misrepresentations in official records. The board therefore recommended that he be eliminated from the Army. That recommendation was approved by the Commanding General of the Second Army, and the Under Secretary of the Army, who ordered petitioner's involuntary retirement effective on August 31, 1963.

2. On August 29, 1963, petitioner brought this action in the District Court for the District of Columbia, against the Secretary of the Army, the Under Secretary of the Army, the Adjutant General, the Commanding General of the Second Army, and his commanding officer. He alleged that the statutory provisions for elimination proceedings, 10 U.S.C. 3791–3797, were unconstitutional on their face, that they were unconstitutional as applied to him, that the elimination proceedings were void because they deprived him of the "fair and impartial hearing" required by 10 U.S.C. 3792(b), and that the elimination proceedings would stigmatize him with moral dereliction.[3] He moved immediately for an injunction to restrain the enforcement of 10 U.S.C. 3791, *et seq.*, and to prevent his discharge from active service and asked for the

[3] This allegation suggests that his discharge would be less than honorable. See *Harmon* v. *Brucker*, 355 U.S. 579. Our information is to the contrary. We are advised that persons in the position of petitioner receive an honorable discharge stating that the bearer "served his country honorably and performed his duty faithfully and well." See AR 635–5, ¶5.

convention of a three-judge court. Respondents moved to dismiss on the grounds that (1) the federal courts cannot enjoin the removal or retirement of federal officers,[4] (2) petitioner had not exhausted his administrative remedies,[5] and (3) his action prior to discharge is premature because his post-discharge remedies would be adequate.[6]

The district court denied the motions of both sides. On the motion to convene a three-judge court, the court ruled that petitioner's attacks were aimed primarily at the procedures utilized by the Army, rather than at the statute itself, and that petitioner had "not established that there is a substantial question of constitutional law arising from the language of the statute itself" (Pet. App. 3a–4a). However, relying on 28 U.S.C. 1292(b), *supra*, p. 2, the court certified that its ruling denying the application for a three-judge court "involves a controlling question of law as to which there is substantial ground for difference of opinion", and that an interlocutory appeal "may materially advance the ultimate termination of this litigation" (Pet. App. 6a).

Petitioner applied to the court of appeals for permission to take an interlocutory appeal, and for an injunction pending appeal. After hearing oral argument on the application, the court of appeals (Fahy and Miller, JJ.) denied the application for permission to take the interlocutory appeal, per curiam, and without opinion (Pet. App. 1a). Judge Wright noted a

---

[4] *White* v. *Berry*, 171 U.S. 366.

[5] *Reed* v. *Franke*, 297 F. 2d 17 (C.A. 4); compare *Ogden* v. *Zuckert*, 298 F. 2d 312 (C.A.D.C.).

[6] *Beard* v. *Stahr*, 370 U.S. 41.

dissent on the ground that "The attack on the constitutionality of the statute is not plainly frivolous" and that therefore a three-judge court was required (*ibid.*).

ARGUMENT

Congress has vested in the courts of appeals almost complete discretion to determine whether to undertake review of certain interlocutory orders of district courts. It has described the exercise of this discretion as "final" and "ultimate" and has compared it to the exercise of this Court's certiorari jurisdiction. It is not, however, necessary in the present case to decide whether the denial of an interlocutory appeal by a court of appeals is ever reviewable, for there is no doubt that this extremely broad discretion was not abused in the present case. Moreover, the only question presented by this petition—whether the court of appeals has abused its discretion on the particular facts of this case—does not warrant review for it is neither of general importance nor of widespread application.

1. In enacting 28 U.S.C. 1292(b) Congress intended to vest the broadest discretion in the courts of appeals. The extent of this discretion is apparent from the Senate Report accompanying the bill (S. Rep. 2434, 85th Cong., 2d Sess., p. 3):

> The granting of the appeal is also discretionary with the court of appeals which may refuse to entertain such an appeal in much the same manner that the Supreme Court today refuses to entertain applications for writs of certiorari.
>
> It should be made clear that if application for an appeal from an interlocutory order is

> filed with the court of appeals, the court of appeals may deny such an application without specifying the grounds upon which such a denial is based. It could be based upon a view that the question involved was not a controlling issue. It could be denied on the basis that the docket of the circuit court of appeals was such that the appeal could not be entertained for too long a period of time. But, whatever the reason, the ultimate determination concerning the right of appeal is within the discretion of the judges of the appropriate circuit court of appeals.

Thus the Senate Report compares the authority of the courts of appeals to that of this Court in the exercise of its certiorari jurisdiction and indicates that "the *ultimate* determination concerning the right of appeal is within the discretion of the judges of the appropriate circuit court of appeals" (emphasis added). Both the House and Senate Reports also speak of "final discretion" resting in the courts of appeals.[7]

2. But is is unnecessary to decide whether the discretion of the courts of appeals under 28 U.S.C. 1292(b) is wholly unreviewable, for it is clear that there has been no abuse of discretion in the present case. Indeed, petitioner does not contend that the refusal of the court of appeals to entertain the appeal

[7] H. Rep. 1667, 85th Cong., 2d Sess., p. 3; S. Rep. 2434, *supra*, p. 7. The quotation is from a report of the Committee on Appeals from Interlocutory Orders of the District Courts of the Judicial Conference of the United States which drafted the bill which became 28 U.S.C. 1292(b).

was an abuse of discretion (Pet. 8–9).[8] He is of the view that "the interlocutory appeal should be allowed unless it is plainly frivolous" (Pet. 9). Such a standard, which may be pertinent to appeals granted as a matter of right, clearly has no application to interlocutory appeals under 28 U.S.C. 1292(b).

In enacting 28 U.S.C. 1292(b) (Pub. L. 85–919), Congress intended to authorize interlocutory appeals in exceptional cases involving protracted and expensive litigation, where such an appeal might avoid the time and expense of trial. It made it clear that it did not intend to authorize such appeals in ordinary cases.[9] In order to limit the taking of interlocutory appeals to such exceptional circumstances, where a question of law was raised which would be dispositive of protracted litigation, Congress provided that an interlocutory appeal should be entertained only when *both* the district court and the court of appeals were of the opinion that such an appeal would materially advance the termination of the litigation and that it involved an issue of law which might be controlling.[10]

---

[8] Nor did the dissenting judge below. He would simply have exercised his discretion differently from the majority (Pet. App. 1a).

[9] H. Rep. 1667, 85th Cong., 2d Sess., p. 2; S. Rep. 2434, 85th Cong., 2d Sess., pp. 2–3, 7. The House report listed, in addition to complex antitrust and conspiracy cases, the following circumstances in which an interlocutory appeal might be appropriate (H. Rep. 1667, *supra*, pp. 1–2): (1) where an accounting remains necessary after liability has been determined; (2) where a long trial remains necessary after a decision overruling a defense going to the right to maintain the action; (3) in cases involving third party defendants which would not be prosecuted without them; and (4) in cases involving transfers.

[10] 28 U.S.C. 1292(b), *supra*, p. 2. H. Rep. 1667, *supra*, p. 2; S. Rep. 2434, *supra*, p. 7.

In the present case the court of appeals could have denied an interlocutory appeal for any of several reasons adequate to sustain the exercise of its extremely broad discretion. It could reasonably have concluded that this case was not the extraordinary kind in which an interlocutory appeal might avoid a protracted and expensive trial. Interlocutory appeals were not intended for routine cases. H. Rep. 1667, *supra*, pp. 1–2. The government urged this consideration in the court of appeals, for this litigation might well be disposed of by summary judgment, on the basis of the administrative record, as is most litigation involving the discharge of federal employees. Again, the court of appeals could reasonably have determined that it was inappropriate to decide whether the constitutionality of the statute was sufficiently drawn in question in this case by the bare complaint, written as it is in largely conclusionary terms.[11] Finally, the court of appeals could have believed that the state of its docket was such that it could not hear and determine the appeal in time materially to advance the termination of this litigation. Any one of these considerations would constitute a sufficient ground for refusing to entertain the interlocutory appeal. S. Rep. 2434, *supra*, p. 3. There is thus no basis for considering the refusal to entertain such an appeal arbitrary or an abuse of discretion.

[11] Petitioner's primary contentions as to his inability to confront or cross-examine 22 hostile witnesses cannot be examined intelligently without knowing whether these witnesses had given evidence adverse to him which was important to the government's case. If the eight witnesses whom the government did offer to produce had supplied all of the important evidence, petitioner could not challenge the constitutionality of the Act on this ground. See n. 2, p. 3, *supra*.

3. Finally, even if there were a substantial question as to whether the court below abused its very broad discretion in denying an interlocutory appeal, Supreme Court review would not be warranted. Petitioner points to no question of general importance or application which arises out of that denial, much less to a conflict between circuits. Pursuant to the Congressional intent that the courts of appeals may refuse to consider such appeals without stated reasons, and in the same way that this Court denies certiorari (S. Rep. 2434, 85th Cong., 2d Sess., p. 3), the court of appeals in the case at bar simply declined to entertain the appeal, without setting forth its reasons. Petitioner does not and cannot assert that the court of appeals applied improper standards in refusing to permit his appeal, but contends only that the court of appeals did not properly exercise its discretion in this case (Pet. 8–9). The application of a court's conceded discretion to the facts and circumstances of a particular case obviously presents no legal issue warranting review by this Court. Such review would be particularly inappropriate in the circumstances of this case, because the order of the court of appeals is interlocutory only, and its sole effect is to postpone appellate review until after a final judgment in the district court. Petitioner is subjected to no substantial harm by being required to await such a final judgment.[12] In these circumstances there is no reason

[12] It is now settled that an army officer contesting his removal from active service has adequate post-removal remedies. *Beard v. Stahr*, 370 U.S. 41, 42. But if petitioner believed that his dismissal would lead to irreparable injury, and that his post-removal remedies were inadequate, he could have pressed his motion for a preliminary injunction. Appeal from the denial

for this Court to depart from its usual practice of refusing to review interlocutory orders. *American Construction Co.* v. *Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384; Stern and Gressman, *Supreme Court Practice* (2d ed., 1954), p. 130.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.[13]

ARCHIBALD COX,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
MORTON HOLLANDER,
DAVID L. ROSE,
Attorneys.

NOVEMBER 1963.

---

of a preliminary injunction is, of course, a matter of right. 28 U.S.C. 1292(a)(1).

[13] Although we believe that the issue of the substantiality of petitioner's claim for an injunction based upon the unconstitutionality of 10 U.S.C. 3791–3797 is not before this Court, we submit that there is, in any event, no substantial doubt in this regard. First, an injunction is not warranted because petitioner's post-retirement remedies are adequate. *Beard* v. *Stahr*, 376 U.S. 41, 42. Beyond this, at least when an officer is given an honorable discharge, the constitution permits the burden of rebutting charges of specific misconduct to be placed on the officer. Cf. *Reaves* v. *Ainsworth*, 219 U.S. 296, 304–306; *Cleary* v. *Weeks*, 259 U.S. 336; *Vitarelli* v. *Seaton*, 359 U.S. 535, 539; *Cafeteria & Restaurant Workers' Union* v. *McElroy*, 367 U.S. 886, 896–898. Finally, petitioner's conclusionary claim of denial of a right to confront his accusers does not constitute an attack on the statute but merely on the way it was applied by the Army in this case. The district court may determine at trial that the statute itself grants petitioner the very rights he seeks.

U. S. GOVERNMENT PRINTING OFFICE 1963